

95-17

OPINION CITED

80-70
87-119
85-112

STATUTES CITED

ARS 49-104(B) (1)
ARS 49-107
ARS 49-107(A)
ARS 49-422(A) (2)
ARS 49-501
ARS 49-501(A)
ARS 49-501(C) (1)

ADMINISTRATIVE CODE

R18-2-602(D)



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December 12, 1995

The Honorable Jim Buster
Arizona State Senate
State Capitol Complex
Phoenix, Arizona 85007

Re: I95-17 (R95-31)

Dear Senator Buster:

You have asked whether the Arizona Department of Environmental Quality (ADEQ) lawfully may delegate by way of a contract the administration and enforcement of its "open burning" permit program to the Yuma Rural/Metro Fire Department. For the reasons that follow, we conclude that ADEQ may not delegate its official functions and duties relating to the open burning program to private parties.

Background

Section 49-501(A), A.R.S., states that it is unlawful for any person to ignite, allow, or maintain any open outdoor fire except as provided in § 49-501. With the exception of the types of fires described in § 49-501(C)(1) and A.A.C. R18-2-602(C)(1), permissible outdoor fires are only those fires set or permitted by federal, state or local governments for official, prescribed purposes. Permission for these fires must be given by the federal, state or local public officer in writing, with a copy of the written permission provided to ADEQ. A.A.C. R18-2-602(D). The setting of such fires are to be done in a manner and at a time approved by the Director of ADEQ, unless doing so would defeat the purpose of the exempted fire. *Id.* A violation of any provision contained in A.R.S. § 49-501 is subject to ADEQ's full enforcement authority. Thus, ADEQ has wide discretion to regulate open fires and to prosecute violators in a variety of ways.

Analysis

Your question concerns the legality of delegating public powers and duties to a private party. Courts have repeatedly held that neither the Legislature nor public agencies may

delegate their official powers or duties to private parties. In *Industrial Comm'n v. C & D Pipeline*, 125 Ariz. 64, 66, 607 P.2d 383, 385 (App. 1980), the Arizona Court of Appeals stated that is "well established" that a Legislature may not delegate its authority to private persons over whom the Legislature has no supervision or control. See also *In re North Jersey Dist. Water Supply Comm'n*, 417 A.2d 1095, 1115 (N.J. Super. 1980) (holding that subdelegations to private persons or entities are constitutionally suspect because such person or entity is not subject to public accountability); *Anderson v. Grand River Dam Auth.*, 446 P.2d 814 (Okla. 1968) (declaring void as unlawful the delegation of regulatory authority contingent on a private party's approval).

Indeed, even intra-agency delegation of official powers and duties from the head of an agency to subordinates within the agency is permitted only when expressly authorized by statute, with only limited exceptions for purely ministerial or non-discretionary duties. See *Peck v. Board of Educ. of Yuma Union High Sch.*, 126 Ariz. 113, 115, 612 P.2d 1076, 1078 (App. 1980) (holding that a board could not delegate certain duties to its superintendent); *Board of Education v. Scottsdale Educ. Ass'n*, 17 Ariz. App. 504, 511, 498 P.2d 578, 585 (1972) (holding that board may not delegate certain duties to its superintendent without legislative authorization), *vacated on other grounds*, 109 Ariz. 342, 509 P.2d 612 (1973); Ariz. Att'y Gen. Op. I87-119 (board of directors of Arizona State Historical Society may not delegate discretionary functions assigned to the board and its treasurer by statute); Ariz. Att'y Gen. Op. I85-112 (board of directors for community colleges may not delegate its authority to waive tuitions); Ariz. Att'y Gen. Op. I80-70 (board of directors for community colleges may not delegate its authority to enter into leases). Because the issuance of ADEQ air quality open burning permits is a function requiring the exercise of considerable discretion rather than a ministerial function that leaves nothing to discretion because the duty and manner of performance are defined with certainty, ADEQ would be prohibited from delegating its functions relating to these permits, absent legislative authority to do so. See *Peck*, 126 Ariz. at 115, 612 P.2d at 1078; Ariz. Att'y Gen. Op. I87-119; Ariz. Att'y Gen. Op. I85-112; Ariz. Att'y Gen. Op. I80-70. Pursuant to A.R.S. § 49-107(A), ADEQ may delegate these functions to local governmental agencies. Further, A.R.S. Title 41, Chapter 6, Article 8 (Delegation of Functions, Powers or Duties) generally authorizes state agencies (including ADEQ) to delegate certain duties to local governmental bodies. However, nothing in A.R.S. § 49-107 nor in Title 41, Chapter 6, Article 7 authorizes delegations to private parties.

ADEQ's ability to enter into contracts for the services of outside advisers, consultants and aides pursuant to A.R.S. §§ 49-104(B)(1) and 49-422(A)(2) does not authorize ADEQ to delegate to a private fire fighting enterprise its discretionary function of administering the open burning permit program. While ADEQ does employ advisers, consultants and aides, these parties merely assist ADEQ in performing its official duties by performing technical

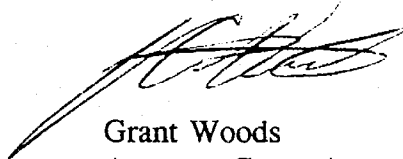
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research and review. The work product submitted to ADEQ by these advisers and consultants is wholly subject to ADEQ review and approval. Pursuant to the above-described line of authorities, ADEQ does not, nor could it, surrender its authority to issue permits or its responsibility to enforce state laws to private consultants or advisers.

Conclusion

Accordingly, because ADEQ may only delegate official functions and duties to other governmental units pursuant to statute, we conclude that ADEQ does not have the authority to contract with a private fire fighting agency for administering the "open burning" permit program to private parties.

Sincerely,

A handwritten signature in black ink, appearing to read "Grant Woods", with a long, sweeping horizontal stroke extending to the left.

Grant Woods
Attorney General